

HERZOG LAW FIRM

January 24, 2013

ELECTRONIC FILING

Hon. Jeffrey Cohen
Acting Secretary
NYS Public Service Commission
3 Empire State Plaza
Albany, NY 12223

Re: Formal complaint of ION Holdco, LLC against NYS Electric
& Gas Corporation – violation of pole attachment rules

Dear Secretary Cohen:

Attached for filing with the Commission is the Formal Complaint of ION Holdco LLC against New York State Electric & Gas Corporation, which contains a request for injunctive relief and initiation of a penalty action.

As set forth in the complaint, NYSEG has arbitrarily, and without authority, adopted new pole attachment make ready survey rates and procedures which impose severe hardship and delay upon ION's effort to expand broadband facilities to Upstate New York, as encouraged by the National Broadband Plan.

NYSEG's intransigence is precluding ION from completing a critical segment of ION's redundant fiber optic network, thus undercutting the availability of redundant, high capacity, and technologically advanced services to colleges and universities, hospitals, wireless carriers and other high priority users in New York State.

The Commission is respectfully urged to grant the relief requested by ION at its first possible opportunity.

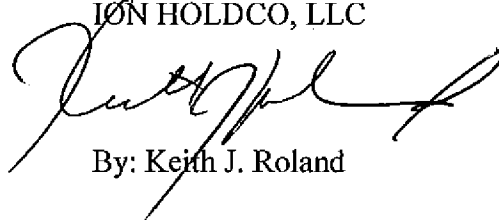
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A copy of this filing is being served on Noelle M. Kinsch, Esq. of Iberdrola USA.

Respectfully submitted,

ION HOLDCO, LLC

A handwritten signature in black ink, appearing to read "Keith J. Roland", is written over the typed name below.

By: Keith J. Roland

KJR/mm
Enclosure

C: Noelle M. Kinsch (by email)

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Formal Complaint of ION HoldCo, LLC Against New York State)
Electric and Gas Corporation; Request for Injunctive Relief;) Case _____
Request to Initiate Penalty Action)

TO THE COMMISSION:

ION HoldCo, LLC (ION) through its attorneys, hereby complains of the unjust, unreasonable and unlawful practices of New York State Electric and Gas Corporation (NYSEG) regarding its refusal to process of ION's applications for pole attachments; urges the Commission to issue immediate injunctive relief against NYSEG's unlawful practices; and asks the Commission to institute a penalty action against NYSEG under Section 25 of the Public Service Law. In support thereof, it is respectfully shown as follows:

1. ION holds a Certificate of Public Convenience and Necessity from this Commission originally issued in Case 04-C-0433 on April 26, 2004, and amended in Case 06-C-0035 on February 6, 2006, authorizing it to provide facilities-based intrastate telecommunications services.¹ Pursuant to that authority, ION is constructing, and currently operates significant portions of, an advanced fiber optic ring architecture network in Upstate New York, with connections in all large metropolitan areas of this State. ION, in conjunction with others, received a Round 1 BTOP Grant from the National Telecommunications and Information Administration of \$39 Million for the expansion of its fiber optic network in rural areas of this State, in order to enable deployment of broadband facilities in connection with the National Broadband Plan.

¹ The Certificate was originally issued to ION's predecessor, Empire State Independent Network LLC.

2. A portion of ION's network expansion, funded by the BTOP Grant, includes developing a redundant fiber route from Dunkirk, New York, to Hamburg, New York, in the western part of the state, along the 18 mile route shown in Exhibit A. This segment is a portion of a 200 mile ring, and the inability to construct this small portion precludes use of the entire ring. In order to construct that network, ION needs to attach its fiber optic facilities to utility poles owned in whole or part by NYSEG.

3. On or about December 18, 2012, ION submitted a number of pole attachment applications to NYSEG in connection with construction of the Dunkirk to Hamburg route. Those applications covered approximately 581 poles, and a route segment of approximately 18 miles.

4. Construction of this route is necessary for ION to complete a redundant ring to serve the needs of colleges and universities, hospitals, and wireless carriers, to assure continuity of service in the event of natural or other disaster. NYSEG's unlawful conduct, which acts as an almost complete barrier to construction of this route, will have a significant adverse impact on the public health, safety, and welfare of the institutions, businesses and citizens of this State.

5. ION is a party to a Pole Attachment Agreement with NYSEG, dated October, 2004, which had originally been executed by Empire State Independent Network, the predecessor of ION.

6. Article III of the ION/NYSEG Pole Attachment Agreement states that "45 days prior to when the licensee wishes to make attachments to NYSEG's poles, the licensee shall make written application, in duplicate,...specifying the type of facility and the location of the poles and anchors." The Pole Attachment Agreement does not set

forth any limit on the number of poles which may be submitted in contemporaneous applications.

7. Article VII of the Pole Attachment Agreement states that upon receipt of an application for a pole license, NYSEG will determine the approximate cost of performing the pre-construction engineering, and upon receipt of payment by licensee, will conduct appropriate surveys of the poles listed with a representative of the licensee, joint owner, and any other third parties. The Pole Attachment Agreement continues with other standard industry provisions, including NYSEG determining, after the survey, what make ready work will be necessary, and NYSEG rendering a bill to the licensee for the make ready work to be performed. The Licensee is required to pay for such make ready work in advance. After payment is received, the Pole Attachment Agreement states, in Section VII(c) “that NYSEG will meet a reasonable schedule for the performance of make-ready work, subject to sixty (60) days’ notice and further subject to the primary priority of power delivery service obligations. If large or multiple applications are received from the licensee or licensees requiring more make-ready work than can be reasonably handled by the operating office, then NYSEG shall endeavor to allocate its available work forces, as far as practical, to accommodate the needs of the licensee or other licensees”.

8. The annual pole attachment rental charge assessed by NYSEG is set forth in its PSC No. 119 Electricity Tariff. However, neither the Pole Attachment Agreement, nor a NYSEG Tariff, sets forth other charges to be paid by a licensee, including application fees, survey fees, and charges for make ready work.

9. This complaint arises from a unilateral action taken by NYSEG on January 11, 2013, which purported to establish new (and unlawful) timelines, rates, and conditions for receipt of pole attachment licenses and the conduct of pre-make ready surveys. Specifically, attached as Exhibit B, is an e-mail from Sharon Zulawski of NYSEG to Jack Beers (Construction Consultant for ION) which establishes new rules for NYSEG's receipt of pole attachment applications and its conduct of surveys.

10. First, NYSEG establishes a new \$30 per pole fee to conduct a survey. No justification for that rate has been provided, and to ION's knowledge, it has not been filed with this Commission.

11. More astonishing, however, is the fact that NYSEG states it will limit its acceptance of pole applications, and its conduct of a survey, to 150 poles. NYSEG indicates it will accept an application for a maximum of 150 poles, take 45 days to conduct a survey for those poles, and then accept another application for up to 150 poles, then take another 45 days for a survey, and so on. By NYSEG's own admission, this arbitrary (and unlawful) limit of 150 poles in a survey would take at least six months for NYSEG to complete the surveys for the make-ready work on this project, to say nothing of when the make-ready work itself will be performed. That will preclude construction of this critical route by ION.

12. NYSEG had not previously established any arbitrary limit for number of poles to be surveyed. And, critically, neither of the other owners of poles involved in this construction – Verizon or Niagara Mohawk – has imposed any such artificial and unreasonable limitation. Those owners accept multiple simultaneous applications for 150

poles, and conduct the necessary surveys and make ready work on all applications in parallel.

13. NYSEG's new "rules" are arbitrary, unjust, unreasonable, and unlawful, in violation of Sections 91 and 92 of the Public Service Law. They also specifically violate the Commission's "Order Adopting Policy Statement on Pole Attachments" issued on August 6, 2004, in Case 03-M-0432. Under that Policy Statement, "Preconstruction surveys must be done 45 days after a complete application has been filed with the pole owner. After conducting a survey of the poles, the owner must send a make-ready work estimate to the attacher within 14 days of completing the survey". Nowhere does the Commission authorize NYSEG to set an arbitrary and unreasonable 150 pole limit on the number of poles to be surveyed within this 45 days. Indeed, the Policy Statement goes on to state "For survey work, if an owner is unable to meet these deadlines, the attacher may hire an outside contractor to do the survey or perform make ready work, if the contractor is approved by the owner".

14. NYSEG has no basis in fact or law to establish a 150 pole limit on conducting surveys. To begin with, the survey process is relatively simple.

15. ION estimates that the entire route of 581 poles (18 miles) could be surveyed during one day, or possibly two days if complex make ready work is involved. ION does not believe complex work is required in connection with the Dunkirk to Hamburg Route.

16. NYSEG's proposal is indefensible. Assuming an average of 25 poles per mile, a 150 pole route would cover 6 miles, which could easily be surveyed within one hour. But NYSEG proposes to have its crews (and other attachers) assemble, drive one

hour, and call it quits. Then, 45 days later, everyone would reassemble to do another one hour drive and then abandon further work. That approach is an extraordinarily burdensome, expensive, and non-sensical way to approach the duty imposed on NYSEG by law.

17. NYSEG's new rules violate not only the policies of this Commission, but directly conflict with the national policy of encouraging and accelerating the deployment of broadband facilities, particularly in underserved areas of the country.

18. In 2009, the U.S. Congress directed the FCC to develop a National Broadband Plan that would insure that every American has access to broadband services. See American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 stat. 115. Congress has also directed the FCC to "encourage the deployment...of advanced telecommunications capability to all Americans" by removing barriers to infrastructure investment. See 47 USC Section 1302(b) (Section 706). Congress also has expressed its desire to insure that consumers in all regions of the country have access to advanced telecommunications and information services at rates that are just, reasonable, and affordable. (47 USC Section 254(b)(1) – (3)).

19. In identifying barriers to affordable telecommunications and broadband services, the FCC has found that "lack of reliable, timely, and affordable access to physical infrastructure – particularly utility poles – is often a significant barrier to deploying wireline and wireless services". See Report and Order and Order on Reconsideration, WC Docket 07-245 and GN Docket 09-51, April 7, 2011, at para. 3. The FCC continued that "the National Broadband Plan found that the costs of deploying a broadband network depends significantly on the costs that service providers incur to

access poles and other infrastructure”. Report and Order and Order on Reconsideration, op cit., at para. 5.

20. In order to eliminate uncertainty, and the barrier to deployment of broadband facilities, the FCC went on to establish various just and reasonable rules, including timelines, covering pole attachments under FCC jurisdiction.²

21. Under those rules, the FCC established specific timelines for conducting surveys, estimates of make ready work, and performance of make ready work. For the stage 1 – survey, at issue here, the FCC established a 45 day timetable, comparable to the 45 days established in this Commission’s own rules.³ The FCC did allow for an extension of time for applications covering between 300 poles and 3,000 poles within any 30 day period, but only to the extent of adding 15 days to the time line for the survey. See Report and Order and Order on Reconsideration, op cit., para. 24 and 63.

A Penalty Action Should Be Commenced Against NYSEG

22. Section 25 of the Public Service Law provides that any public utility which knowingly fails or neglects to obey or comply with a provision of the Public Service Law or an order of the Commission shall forfeit to the people of the state a sum not exceeding \$100,000 for each and every offense, and, in the case of a continuing violation, each day

² The FCC’s Pole Attachment orders apply only to pole attachments in states which have not separately certified to the FCC that the state will develop and enforce its own pole attachment rules. New York regulates pole attachment rates, terms and conditions under Section 119-a of the Public Service Law. Accordingly, the FCC rules do not technically apply to pole attachments in New York, but are nonetheless persuasive in understanding the need for timely performance by pole owners to avoid frustrating the national policy of broadband deployment.

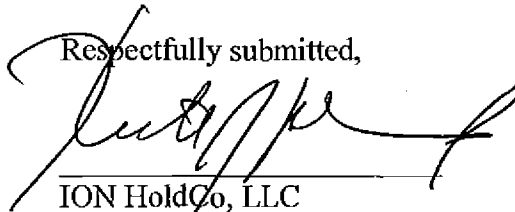
³ The FCC cited this Commission’s 45 day timeframe for a survey in adopting the same standard. See Report and Order and Order on Reconsideration, fn. 78.

shall be deemed a separate and distinct offense. Actions to enforce such penalties may be commenced by the Commission in any court of competent jurisdiction in the name of the people of the state.

23. NYSEG's conduct in precipitously, and unilaterally, taking actions which violate this Commission's Pole Attachment Policies, and which undercut state and national policies to permit the rapid expansion of broadband facilities, cannot be justified or sanctioned by this Commission. NYSEG's conduct rises to an egregious level, taken with full knowledge of the impact its unlawful conduct will have upon ION and the residents and businesses of this state which can be served by ION's broadband network. In order to prevent continued unlawful conduct by NYSEG, and to deter other utilities in this state from arrogantly breaching their obligations under the Public Service Law, this Commission should forthwith initiate a penalty proceeding against NYSEG, seeking a penalty of \$100,000 for each of the poles in ION's make ready applications for which NYSEG has refused to conduct the mandatory survey.

Wherefore, ION respectfully urges this Commission, on an expedited basis and at its first opportunity, to grant the Complaint herein; forthwith order NYSEG to conduct all required make ready surveys for the Dunkirk to Hamburg route applications filed by ION on December 18, 2012, within the next 30 days; order NYSEG to comply with all other timeframes set forth in the Commission's Order Adopting Policy Statement On Pole Attachments; set aside as unlawful NYSEG's \$30 per pole survey fee; commence a penalty action against NYSEG under §25 of the Public Service Law; and grant such other and further relief as appears just and proper.

Respectfully submitted,



ION HoldCo, LLC
By: Keith J. Roland
Herzog Law Firm P.C.
Its Attorneys
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Albany, New York 12211
Tel: (518) 465-7581 Extension 185
e-mail: kroland@herzoglaw.com

Dated: Albany, New York
January 24, 2013

EXHIBIT A

EXHIBIT B

----- Forwarded message -----

From: Zulawski, Sharon <SAZulawski@nyseg.com>
Date: Fri, Jan 11, 2013 at 2:55 PM
Subject: RE: Dunkirk to Hamburg make ready ride ASAP
To: Jack Beers <jack.beers@gmail.com>

Jack

NYSEG wants to do cable tv a new way. They want me

- 1) bill you \$30/pole with a 150 pole limit
- 2) your compmay makes the payment
- 3) we go on a rideout
- 4) I have 45 days to write up a job
- 5) After that we can do another 150 poles

They supervisors are having a conference call on this on Tuesday. Do you want to wait til Tuesday before making any plans? With this new way of doing things, your 559 pole project will take at least 6 months.

<image001.jpg>

Sharon A. Zulawski

Electric Field Planner
5655 South Park Avenue
Hamburg, NY 14075

716 649-5556 ext 276

Fax 716-649-7083

sazulawski@nyseg.com

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In the interest of the environment,
please print only if necessary and recycle.

From: Jack Beers [mailto:jack.beers@gmail.com]
Sent: Friday, January 11, 2013 11:05 AM
To: Zulawski, Sharon; Ron Greek; Kuhn, William; allen.preiscel@rjetelecom.com; Deb Allen
Subject: Dunkirk to Hamburg make ready ride ASAP

Sharon,

I would like to do the NYSEG Dunkirk to Hamburg ride ASAP. What is the first date you have available?

Thanks
Jack

1/22/2013